THE EFFICACY OF THE PUBLIC PROTECTOR IN CURBING MALADMINISTRATION IN ZAMBIA

BY

EMMANUEL MUTALE

(2017011382)

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UNZA **2021**

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DEDICATION

This dissertation is dedicated to my loving parents, Mr Osward Kingstone Mutale and Mrs Sylvia Chisekula Mutale. Thank you for your unconditional love, unending support, motivation and prayers. I'll forever be grateful to God for your lives and I hope to always make you proud.

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In the words of Tony Stark in the movie 'Avengers: Endgame', *"Part of the journey is the end."* As I approach the end of my journey of attaining my LL.B, I wish to extend my heartfelt gratitude to those that have been instrumental to this journey.

Firstly, I wish to thank the Lord Almighty for His favour, mercy and grace during this journey. This would not have been possible if not for God's unending love. During the many hardships of this journey, I was reminded of Philippians 4:13; *"I can do all things through Christ who strengthens me."*

I wish to extend my gratitude to my research supervisor, Dr Annie Kangwa Chewe, for her consistent attention and time, invaluable advice, exceptional guidance and her positive encouragement. It was an honour to be supervised by you and I am indebted to you for all your efforts.

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ABSTRACT

This research critically evaluates the efficacy of the Public Protector in curbing maladministration in Zambia. The Public Protector was established to replace the Investigator-General who headed the Commission for Investigations. This was due to the fact that the Commission for Investigations was a weak institution encumbered by many limitations such as limited jurisdiction, lack of independence, limited and inconsistent financing, and unqualified staff, among other reasons. The Public Protector has therefore been established to rid the ineffectiveness of its predecessor. Against this background, the purpose of this research is to assess how effective the Public Protector is with regards to fulfilling its mandate of promoting good governance within public institutions by investigating cases of maladministration. It is important to evaluate the law establishing the Public Protector as this law was enacted as a response to cure the ineffectiveness of the Commission for Investigations. The law in question is the Constitution of Zambia (Amendment) Act No. 2 of 2016 and the Public Protector Act No. 15 of 2016. The research assesses the established functions, jurisdiction and powers of the Public Protector. Particularly, it evaluates the enhancements introduced by the two Acts.

The knowledge gap that necessitated this research is that since the establishment of the Public Protector, there have not been many studies done to assess the effectiveness of the Public Protector especially that it was established to cure the ineffectiveness of its predecessor.

The research employed a qualitative methodology. This involved desk research that reviewed primary and secondary sources. The information was collected from the relevant legislation, journal articles, books, theses, reports and online resources.

The major research findings were that although efforts to reform the ineffective Commission for Investigations began as early as 1995, the reform only came in 2016 with the establishment of the Public Protector. The research found that the Public Protector is a more enhanced institution with wider powers, wider jurisdiction and more functions than its predecessor. Despite this enhancement, the research found that the Public Protector is still encumbered by limitations and weaknesses such as a lack of implementation of the institution's new structure, a lack of jurisdiction to investigate top government officials, requirements that prejudice the operations of the Public Protector, and contradictory provisions within the Public Protector Act.

Based on the findings, the research recommends that government implements the new structure of the institution, the legislature amends the Constitution to encompass top government officials within the jurisdiction of the Public Protector, the legislature amends the Public Protector Act to remedy the contradictory provisions, and that the government puts measures in place to educate the public on the role and importance of the Public Protector.

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

The aim of this research is to assess the efficacy of the Public Protector in curbing maladministration in Zambia. Particularly, the research aims at evaluating the effectiveness of the Public Protector in holding state institutions accountable to the public by uprooting maladministration and malfeasance with the intent of promoting good governance and integrity. In order to achieve its aims, this research will analyze the powers and functions of the Public Protector as prescribed by the Constitution of Zambia (Amendment) Act No. 2 of 2016 and the Public Protector Act No. 15 of 2016. It will then delve into analyzing the limitations and weaknesses of the public protector. Against this background, this chapter endeavors to lay a foundation for the research. It provides the background, statement of the problem, research objectives, research questions and methodology of the research. It also addresses the significance of the study, a review of the literature that informs this research and an overview of the chapters.

1.2 BACKGROUND

Prior to 1971, there was an increasing perception of corruption by government officials and abuse of power by public institutions. In 1971, the President of Zambia at the time, Kenneth Kaunda, proposed the need for an ombudsman as a mechanism to address the alleged increase in corruption and abuse of power.[1] In 1972, a Constitution Review Commission led by Mainza Chona was set up with the purpose of receiving suggestions from the public regarding the

[1] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

amendment to the Constitution. This Commission took up the proposal for an ombudsman and received submissions from the public regarding the same. In many submissions, it was alleged that leaders and officials had amassed wealth and property from corruption and abuse of authority.[2] Consequently, as a result of the various submissions from the public, the Chona Commission recommended the establishment of an ombudsman. The recommendation was taken up and enacted in the 1973 Constitution of Zambia. Article 117 of the new Constitution enactment established the ombudsman styled as the Investigator-General. The Investigator-General was to be appointed by the president in consultation with the Judicial Service Commission. The Investigator-General was to head an ombudsman institution referred to as the Commission for Investigations.[3]

The Commission's mandate was to deal with arbitrary use of authority, improper use of discretionary powers and the misapplication of the law by public officers. The Commission was empowered to address issues of maladministration and malfeasance in public institutions.[4] The Commission for Investigations was tasked with the duty of investigating the exercise of authority by public institutions and officers. The Commission could investigate any person in the service of the Republic, persons in the service of local authorities, or any institution or organization in which government held majority of shares or exercised financial control.[5]

The Commission had jurisdiction to receive complaints of allegations from any individual or any body of persons. The Commission was also empowered to inquire into the conduct of any person whenever directed by the president to do so. Additionally, the Commission had the discretion to

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[2] Ibid.

[3] Ibid

[4] Annie Chewe-Chanda, 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: The Commission for Investigations and the Permanent Human Rights Commission in Zambia' (2009) *EISA Research Report No. 43*

[5] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

inquire into any case it considered that an allegation of maladministration or abuse of office should be investigated.[6] However, the commission was barred from investigating the president, or decisions of the court or judicial officer.[7]

Although established for good purpose, the Commission for Investigations was found to be very ineffective in delivering on its mandate and functions during its existence. The Commission was stifled by several limitations and weaknesses regarding its independence and capacity to deliver on its mandate.[8] The Commission had limited qualified staff and had no capacity to employ its own qualified members of staff.[9] Furthermore, there were several factors that limited its effectiveness such as having a limited mandate, having limited authority to act, being understaffed, and irregular and insufficient funding. Lastly, despite the fact that the work of the Commission for Investigations was publicized through sensitization programs, it was evident that this was not enough to sensitize the public on the role and importance of the institution.[10]

Due to the many limitations and weaknesses, the Commission for Investigations became a subject that needed reform. This reform came in 2016 with the enactment of the Constitution of Zambia (Amendment) Act.[11] The Constitution of Zambia (Amendment) Act, in Article 243, establishes the Public Protector who replaced the Investigator-General. It was reiterated in the *Public Protector of the Republic of Zambia v Indeni Petroleum Refinery Company Ltd*[12] that the Constitution of Zambia (Amendment) Act was meant, among other things, to cure the

[6] Ibid.

[7] Annie Chewe-Chanda, 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: The Commission for Investigations and the Permanent Human Rights Commission in Zambia.' (2009) *EISA Research Report No. 43*

[8] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

[9] Ibid.

[10] Annie Chewe-Chanda, 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: The Commission for Investigations and the Permanent Human Rights Commission in Zambia.' (2009) *EISA Research Report No. 43*

[11] Act No. 2 of 2016

[12] Selected Judgment No. 16 of 2019

ineffectiveness of the Commission for Investigations. It was reiterated that the amendment was meant to foster an independent office and boost the efficiency of the institution with the intent of ensuring good governance and integrity by providing an effective mechanism of investigating actions of state institutions.

The mandate and functions of the Public Protector are laid down in the Constitution and further prescribed by the Public Protector Act.[13] 'The Public Protector is entrusted with the mandate to promote and safeguard the interests of citizens in their quest to receive a public service that is fair and just.' Further, the Public Protector promotes good governance within state institutions in the delivery of public services.[14] Based on its mandate, it can be deduced that the purpose of the Public Protector is to ensure that public officers and institutions act in accordance with the law, exercise their authority within the law and discharge their duties accordingly. This is in order to strengthen constitutional democracy by uprooting impropriety and abuse of power.[15]

The functions of the Public Protector as prescribed by Article 244 of the Constitution are, among others, to investigate actions and decisions made by state institutions. The Public Protector is empowered to receive complaints from members of the public regarding allegations of abuse of authority or abrogation of the law by public institutions and/or their agents.

1.3 STATEMENT OF THE PROBLEM

The Public Protector is a mechanism established to ensure that those in public institutions exercise their powers in accordance with the law and discharge their functions efficiently. Since

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[13] Act No.15 of 2016

[14] Caroline Sokoni, 'The Role of the Public Protector/Ombudsman' (2018) <https:www.laz.org.zm/wp-content/uploads/2018/08/Role-of-the-Public-Protector-Ombudsman-Mrs-Caroline-C.Z.-Sokoni.pptx>

[15] Tseliso Thipanyane, 'Strengthening Constitutional Democracy: Progress and Challenges of the South African Human Rights Commission and Public Protector' (2015) *NYL Sch. L. Rev, 60, 125*

its creation through Constitution of Zambia (Amendment) Act No. 2 of 2016, there have not been many studies done to investigate the efficacy of the Public Protector in discharging its mandate of ensuring that public officers discharge their functions efficiently and within the law. It therefore becomes necessary to research and investigate the efficacy of the public protector in maintaining efficient and ethical public administration in Zambia.

1.4 RESEARCH OBJECTIVES

The objectives of this research are:

1. To investigate the role and function of the Public Protector in Zambia.
2. To assess the limitations and weaknesses of the Public Protector of Zambia.
3. To analyze how the limitations and weaknesses of the Public Protector, if any, affect the discharge of its mandate.

1.5 RESEARCH QUESTIONS

The following are the research questions:

1. What is the role and function of the Public Protector in Zambia?
2. What are the limitations and weaknesses of the Public Protector in Zambia?
3. How do the limitations and weaknesses affect the discharge of the Public Protector's mandate?

1.6 SIGNIFICANCE OF THE STUDY

Public institutions play a significant role in Zambia as they exist to serve the interests of the public by providing goods and services. Due to the frequency at which citizens interact with public institutions, this research touches on one of the most important mechanisms meant to protect citizens against arbitrary use of power by public institutions and their agents. It endeavors to investigate the efficacy of the Public Protector as a mechanism meant to curb maladministration in public institutions. This is important because it is still unclear how effective the Public Protector's office is since it was established five years ago, in 2016, under a new mandate. This research is meant to benefit the general public as it is the general public that interacts with public institutions daily and at risk of falling victim to the abuse of authority by public institutions and their agents. It benefits the public by creating a sense of awareness and vigilance regarding their interaction with public institutions and the mechanism meant to ensure good administration. This research also benefits the government as it brings out elements of the Public Protector that may require reform in order to ensure more effectiveness of the institution. Additionally, this research also benefits the Public Protector itself as an institution as it brings out measures that may be adopted by the institution in order to increase its efficacy. Lastly, this research is also adding to the existing body of knowledge on this subject.

1.7 LITERATURE REVIEW

A wide array of literature exists on this research topic. To begin with, CJ Tchawauo Mbiada[16] gives a historical account of when and where the concept of an ombudsman was established and

[16] Tchawauo Mbiada, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' (2017) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, *20(1)*

developed. Aufrecht[17] provides further information on the historical account of the ombudsman with regards to its origin. These two scholars reiterate how the modern ombudsman was first established in Sweden. The work of these two scholars is particularly important as it provides for the genesis of the subject of this research paper.

Stig Jagerkiold[18] provides an account of the spread of the idea of an ombudsman institution to other parts of the world. The author reiterates how the end of the Second World War facilitated the spread of the institution as it was realized by many nations that such a mechanism that held public authorities accountable was essential to ensure decisions were made within the law. Additionally, Agus Triono[19] highlights the role that human rights protection after the Second World War played in the spread of the ombudsman institution to other parts of the world. The work of these authors is important to this research as it lays the foundation of how other countries began to adopt the ombudsman institution based on the value of its existence. Their sentiments coincide with some of the sentiments this research endeavors to express regarding the need and importance of the ombudsman.

John Hatchard[20] provides an account for the development and spread of the ombudsman institution in Africa. With some African countries gaining independence as early as the 1960s, the author provides an account on the establishment of ombudsman institutions in these newly independent states. In a similar light, Annie Kangwa Chewe[21] provides a historical background of the development of the ombudsman institution in Zambia. The author reiterates what led to the

[17] Steven Aufrecht, 'The Ombudsman Office' (1998) *Public Administration and Public Policy Vol. 2: Encyclopedia of Life Support Systems (EOLSS)*
[18] Stig Jagerskiold, 'The Swedish Ombudsman' (1961) *University of Pennsylvania Law Review Vol. 109, No. 8*: 1077-1099 doi:10.2307/3310586
[19] Agus Triono, 'The Ombudsman System for Maladministration Settlement in Indonesia' (Doctoral Thesis, Kanazawa University 2019)
[20] John Hatchard, 'Protecting the Public from Maladministration by the Public Service: The Development of the Office of Ombudsman' (1985) *Zimbabwe Law Review*, *Vol. 3, No. 1 & 2*
[21] Annie Kangwa Chewe, *Administrative Law in Zambia* (Claremont: Juta and Company (Pty) Ltd 2020)

establishment of the ombudsman institution and how it was established in Zambia. These works are particularly important to this research as they highlight the genesis of the ombudsman institution in Africa, and particularly Zambia. The work of also lays a foundation to the research as it reiterates what led to the creation of the ombudsman and how that institution was established in Zambia. This work enables the research to highlight the background of the subject matter of this research.

Annie Chewe-Chanda's[22] work provides a historical context regarding the effectiveness of democracy protection institutions, particularly the Investigator-General as an ombudsman institution. The author's work is particularly significant because it gives a background of how effective the Public Protector's predecessor was. Chewe-Chanda enlists and reiterates some weaknesses and limitations that diminished the effectiveness of the Investigator-General. The report also gives an overview of the recommendations proposed at the time which materialized in the Constitution of Zambia (Amendment) Act No. 2 of 2016 when the Public Protector was established. Although this work is important in creating a historical context, it does not speak to the current legal framework of the ombudsman, and that is what this research seeks to do in addition to highlighting the reasons that led to reformation of the institution.

Alfred Chanda[23] provides an overview of the Constitution Review Commissions of 1995 and 2005. The author highlights the work that these Commissions were tasked with which mainly consisted of coming up with recommendations regarding amendment of the Constitution. These Commissions were tasked with, among other things, the duty of receiving submissions on how the ombudsman institution could be improved and made more effective. This work is important

[22] Annie Chewe-Chanda, 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: The Commission for Investigations and the Permanent Human Rights Commission in Zambia' (2009) *EISA Research Report No. 43*
[23] Alfred Chanda, *Constitutional Law in Zambia: Cases and Materials* (University of Zambia Press 2012)

because it highlights efforts that were made to reform the ombudsman institution. However, it is limited as it does not include the actual reform that was brought in 2016. The research therefore goes further to account for the reform itself.

Caroline Sokoni[24], the Public Protector of Zambia, in her presentation at the Law Association of Zambia Annual Junior Lawyers Committee (JLC) Advocacy Skills Training Workshop explains the role of the Public Protector, an office that she holds. She begins by highlighting on Zambia's transition from an Executive Ombudsman, the Investigator-General, to a Parliamentary Ombudsman, the Public Protector. She proceeds to reiterate the mandate of the Public Protector and further explains the composition of that office. The presentation then delves into functions of the Public Protector and the jurisdiction of that office. Although her presentation provides for the mandate, functions and jurisdiction of the Public Protector, the work does not critically analyze the limitations and weaknesses of that office, and their effect on the efficacy of that office.

Kalunga and Kaaba[25] provide an account of the evolution of the ombudsman institution in Zambia from the Investigator-General at inception to the recently established Public Protector. This work is particularly important because it highlights how the ombudsman in Zambia was established as one of the mechanisms meant to promote and protect democracy and citizen's rights by ensuring efficient and effective public administration. Significantly, this work provides a critique of the current legal framework of the Public Protector of Zambia and highlights some perceived weaknesses. This makes the authors' work valuable to this research. However, the authors' work is limited to highlighting a few weaknesses in the enabling Act of Parliament. This

[24] Caroline Sokoni, The Role of the Public Protector/Ombudsman (2018) <https:www.laz.org.zm/wp-content/uploads/2018/08/Role-of-the-Public-Protector-Ombudsman-Mrs-Caroline-C.Z.-Sokoni.pptx>

[25] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

research, therefore, seeks to highlight other limitations, weaknesses and factors beyond the enabling Act of Parliament.

Mubangizi[26] reiterates that the mandate of the Public Protector must be in line with building and promoting good governance. The author reiterates how this is achieved through wide jurisdiction to investigate maladministration. Further, Chazwagwa Edison Fani[27] argues that wide jurisdiction that encompasses top government officials is one of the main factors that ensure an effective watchdog institution. This work is relevant to this research as the sentiments expressed by these authors are compared to Zambia's position by this research. This research conjoins these sentiments to provisions of the Constitution and the Public Protector Act with a view of assessing the efficacy of the Public Protector.

Theophilopoulous and De Matos[28] give and account of South Africa's position regarding the Public Protector's wide jurisdiction that encompasses top government officials including the president. They argue that inclusion of top government officials within the jurisdiction of the Public Protector ensures that the whole sphere of government administration is made accountable for their actions and decisions. Although this work represents the South African jurisdiction, it is relevant to this research as it sets a benchmark against which the efficacy of Zambia's Public Protector will be assessed by this research.

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[26] John C. Mubangizi, 'The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: a comparative review of their roles in good governance and human rights protection' (2012) *Comparative and International Law Journal of Southern Africa 45*(3), 304-327

[27] Chazwagwa Edison Fani, 'Evaluating the ombudsman: a preliminary investigation of South Africa and Botswana'*(*Master's thesis, University of Cape Town 2005)

[28] Constantine Theophilopoulos & Ala, C. De Matos, 'An analysis of the Public Protector's investigatory and decision-making procedural powers' (2019) *PER: Potchefstroomse Elektroniese Regsblad*, 22(1), 1-28.

Oluwafemi Alexander Ladapo[29] reiterates the importance of effective investigatory practice. The author reiterates how protection of information is vital to the credibility of an investigation. Overall, the author gives an overview of good investigatory practices that ensure credible and effective investigations. Although this work only gives a general overview of investigations, this research marries this work to the investigatory practices of the Public Protector. It uses this work to assess the efficacy of the Public Protector in investigating cases of maladministration.

1.8 METHODOLOGY

In this research, the methodology employed is a qualitative one. Desk research will be carried out in order to achieve the objectives of this work. This research will analyze and review primary data emanating from statutes and case law. It will also analyze and review secondary data emanating from books, journal articles, theses, dissertations, legal and non-legal law reviews, and internet sources.

1.9 OUTLINE OF THE CHAPTERS

This research follows the structure outlined below:

Chapter one introduces the research topic, it provides a background to the research, addresses the problem statement, establishes the research objectives and questions, and provides an overview of the body of literature to be relied upon in the research. Chapter two will provide a historical account of the origin of the ombudsman and its development all around the world. This chapter will then discuss the development of the ombudsman in Zambia and particularly look at the roles, functions and mandate of the Investigator-General as the first ombudsman of Zambia.

[29] Oluwafemi Alexander Ladapo, 'Effective Investigations, A Pivot to Efficient Criminal Justice Administration: Challenges in Nigeria' (2011) *African Journal of Criminology and Justice Studies Vol. 5, Issue 1 & 2*

Chapter three begins by assessing the weaknesses of the Investigator-General and the need for reform at the time. It then discusses the establishment of the Public Protector as the ombudsman of Zambia under a new mandate. It looks at the current role, functions and mandate of the Public Protector. Chapter four begins by analyzing some of the weaknesses of the Commission for Investigations that were addressed by the establishment of the ombudsman. Chapter four also analyzes the limitations and weaknesses of the Public Protector in Zambia and reiterates how these limitations and weaknesses affect the efficacy of the Public Protector. Lastly, chapter five concludes the research and provides valuable recommendations.

1.10 CONCLUSION

Chapter one has outlined the research on the efficacy of the Public Protector in maintaining efficient and ethical public administration in Zambia. It has introduced the topic, addressed the main aim of the research, provided a background to the research, addressed the problem statement, the research objectives, the methodology employed, and a literature review of some of the scholarly work on which this research will rely.

CHAPTER TWO

ORIGIN AND DEVELOPMENT OF THE OMBUDSMAN

2.1 INTRODUCTION

The ombudsman plays a very important role in democratic systems as it is purposed at ensuring tenets of democracy such as the rule of law and proper administration of the public sector are respected by those serving in public institutions. This chapter, therefore, endeavors to provide a historical account of the origin and development of the ombudsman. It begins by defining an ombudsman, establishing where it began and provides reasons that led to its establishment. Further, it gives an account of how it was established, its functions and the scope of its mandate. This chapter then addresses the spread and development of the institution in various parts of the world including Africa. Lastly, this chapter addresses the development of the ombudsman in Zambia. It addresses the role, functions and mandate of the Investigator-General and the Commission for Investigations as the ombudsman and ombudsman institution in Zambia.

2.2 ORIGIN OF THE OMBUDSMAN

The word ombudsman goes by different definitions. It may be defined as a high level official appointed to receive, investigate and act on citizen's complaints about administrative injustice or maladministration from government institutions.[1] It may also be defined as an institution that is established by the Constitution or an Act of Parliament and is headed by an independent public official tasked with receiving complaints from citizens against government agencies and departments, officials and employees for maladministration, misapplication of the law, unjust

[1] Bryan Garner, *Black's Law Dictionary* (9th Edition, West Publishing 2009), p. 1196- 1197

decisions or discriminatory acts. This institution receives complaints, investigates actions and may take action based on its findings.[2] Essentially, an ombudsman may be an individual or an institution that serves as a mechanism against maladministration, malfeasance and administrative injustice perpetuated by government institutions, officials, agents and employees.

In this context, maladministration refers to poor management or use of administrative authority, whereas malfeasance refers to wrongdoing, misconduct or unlawful use of authority by a public official.[3] Administrative injustice refers to an unfair or unjust state of affairs in public administration.[4]

Although different ombudsman institutions go by different names and take different forms, they are essentially aimed at curbing maladministration, malfeasance and administrative injustice by receiving and investigating complaints against government institutions and agents from members of the public.[5]

There are various accounts of the origin and establishment of the first official ombudsman. However, many accounts trace the term 'ombudsman' as originating from Sweden. The original creation and roots of the ombudsman can also be attributed to Sweden.[6] The ombudsman in Sweden can be traced back to as early as 1713.

Mbiada narrates that in 1709, King Charles XII of Sweden was defeated by the Russian military. Consequently, he fled to Turkey for a number of years. The years that followed were

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[2] John C. Mubangizi, 'The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: a comparative review of their roles in good governance and human rights protection' (2012) *Comparative and International Law Journal of Southern Africa 45(3)*, 304-327

[3] Bryan Garner, *Black's Law Dictionary* (9th Edition, West Publishing 2009), p. 1042

[4] Ibid, p. 857

[5] National Democratic Institute for International Affairs, 'The Office of the Public Protector in the Republic of South Africa: A Discussion of Key Issues in International Perspective' (2000) *National Democratic Institute for International Affairs*

[6] Steven Aufrecht, 'The ombudsman office' (1998) *Public administration and public policy Vol. 2 Encyclopedia of Life Support Systems (EOLSS)*

characterized by abuse of authority by public officials and high contempt for the public officials and leaders by the citizens. In the King's attempt to continue ruling his declining nation from afar and stem out civil strife against the leaders left in Sweden, he appointed an official referred to as *Justitiekanslern* or Chancellor of Justice to regulate government administration by monitoring the conduct of public officials. This was one of his administrative reforms.[7] The mandate of the *Justitiekanslern* was to ensure that public officials and government servants discharged their duties within the confines of the law and regulations in place.[8] In discharging the mandate, the *Justitiekanslern* was empowered to receive complaints about public officials and government servants from the citizens and to initiate legal proceedings against any public official or servant who violated the law in discharging their duties.[9]

Petri Karonen recounts that in 1809, due to the revolutionary upheaval in Sweden, the King of Sweden, Gustavus IV Adolfus was deposed.[10] Subsequently, major changes to the system of government took place. A more democratic constitution emphasizing the separation of powers was adopted. The Constitution established an office of *Justitieombudsman* as the ombudsman of Sweden.[11] The new constitution also granted parliament the authority to appoint the ombudsman. The ombudsman was tasked with the responsibility of regulating government activity by denouncing and curbing irregularities and negligence on the part of government servants and public officials in the discharge of their duties, and with ensuring correct application of the law.[12]

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[7] Tchawauo Mbiada, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realization of the Right to Access Adequate Housing in South Africa' (2017) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad, 20(1)*

[8] Antonio Mora and Maria Jose Imbernon Garcia, 'The Book of the Ombudsman' (2003) <http://aoma.ukzn.ac.za/Libraries/Externalreports/BookofOmbudsman.sflb.ashx> Accessed on: 17/05/2021

[9] Ibid

[10] Petri Karonen, 'The Peace Treaty of Fredrikshamn and its Aftermath in Sweden and Finland' (2010) *1700-tal: Nordic Journal for Eighteenth-Century Studies 7*, 168-183.

[11] Antonio Mora and Maria Jose Imbernon Garcia, 'The Book of the Ombudsman' (2003) <http://aoma.ukzn.ac.za/Libraries/Externalreports/BookofOmbudsman.sflb.ashx> Accessed on: 17/05/2021

[12] Ibid

The ombudsman was also tasked with the responsibility of receiving and investigating citizens' complaints against public officials and civil servants, and to prosecute those who acted outside the law in discharging their duties.[13]

After the establishment of the ombudsman in Sweden, it took more than a century for this institution to expand and develop in countries beyond Sweden.[14] The ombudsman became an institution of international interest in the 20th century. Following Sweden's lead, Finland adopted an ombudsman institution in 1919 after gaining its independence from Sweden.[15]

However, it was not until the violent upheavals that shook the world during the Second World War that many countries began considering measures to regulate the exercise of authority by public officials and civil servants in discharging their duties. Many countries began to consider ways in which they could regulate the relation and interaction between citizens and the state.[16] As a result, the popularity of the ombudsman institution began to gain momentum. This was also due to the fact that after the Second World War, the importance of human rights and protection of citizens from abuse by the state became a major theme with the establishment of the United Nations and the adoption of the Universal Declaration of Human Rights.[17]

As a result, the ombudsman institution was adopted in other countries. It was adopted in Denmark in 1954 when the King assented the Parliamentary Ombudsman Act. This was

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[13] Tchawauo Mbiada, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realization of the Right to Access Adequate Housing in South Africa' (2017) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad, 20(1)*

[14] Ibid

[15] Stig Jagerskiold, 'The Swedish Ombudsman' (1961) *University of Pennsylvania Law Review Vol. 109, No. 8*: 1077-099 doi:10.2307/3310586

[16] Ibid.

[17] Agus Triono, 'The Ombudsman System for Maladministration Settlement in Indonesia' (Doctoral Thesis, Kanazawa University 2019)

followed by Norway and New Zealand that adopted the ombudsman in 1962. This marked the beginning of the worldwide establishment of the ombudsman institution.[18]

In Africa, with countries attaining their independence during the 1960s and 1970s, the ombudsman was an institution considered as a good mechanism to have in place to ensure regulation of public administration in newly independent states. Tanzania became the first African country to establish an ombudsman institution in 1965. It was established as the Permanent Commission of Enquiry and tasked with the responsibility of safeguarding against the abuse of authority by those entrusted with it. This benchmark set by Tanzania was followed by other African countries such as Ghana which established an ombudsman in 1966, Mauritius in 1970 and Zambia in 1973.[19]

2.3 ESTABLISHMENT OF THE OMBUDSMAN IN ZAMBIA

The proposal on the need and establishment of an ombudsman institution in Zambia was first made in 1971 by the then president, Kenneth Kaunda, in his address to the 6th General Conference of the United National Independence Party (UNIP), the then ruling party. This proposal was made to address the perceptions of rampant corruption, administrative injustice and abuse of authority by public authorities and civil servants.[20] There was a general perception among citizens that politicians and other people with links to public officials and officers had accumulated wealth through dubious means within a very short time of taking up public office.[21]

[18] McKenna Lang, 'A Western King and an Ancient Notion: Reflections on the Origins of Ombudsing' (2011) *Journal of Conflictology Vol. 2, Issue 2*, 56-65
[19] John Hatchard, 'Protecting the Public from Maladministration by the Public Service: The Development of the Office of Ombudsman' (1985) *Zimbabwe Law Review, Vol. 3, No. 1 & 2*
[20] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46
[21] Annie Kangwa Chewe, *Administrative Law in Zambia* (Claremont: Juta and Company (Pty) Ltd 2020), 226

In 1972, President Kenneth Kaunda announced that cabinet had resolved to establish a one-party system of government for the purposes of preserving national unity, maintaining peace and accelerating development. In the same year, President Kaunda appointed a Commission of Inquiry (the Chona Commission) headed by Mainza Chona, to consider changes to the Republican Constitution that were necessary to actualize a one-party system of government. The Commission was to recommend the manner and form the one-party system was to take.[22]

The Chona Commission also took up President Kaunda's proposal to establish an ombudsman in Zambia as one of the terms of reference of the inquiry. They were to receive submissions from members of the public on the subject of creating an ombudsman. The Commission received submissions from the public that several leaders had accumulated wealth as a result of corruption and abuse of authority.[23] The Commission considered the submissions and came to the conclusion that there was need to establish an ombudsman office which would investigate such allegations against public officials and related matters. Consequently, the Commission recommended the establishment of the Investigator-General as the ombudsman of Zambia.[24] The Commission Report listed the benefits of establishing the ombudsman. These benefits included:

1. Being of tremendous value to the administration by informally advising, reminding and reproving.
2. Soothing the public feeling over reports of outrageous practices by the fact that their complaints were receiving attention.

[22] Alfred Chanda, *Constitutional Law in Zambia: Cases and Materials* (University of Zambia Press 2012)
[23]Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46
[24] Constitution Review Commission, *Report of the National Commission on the Establishment of A One-Party Participatory Democracy in Zambia* (1972), 37

3. It would also be of tremendous value to the administration by rejecting unjustified complaints.[25]

The recommendation was taken up in the enactment of the 1973 Republican Constitution. The Constitution, in Article 117, provided for the Investigator-General. The Investigator-General was to serve as the ombudsman of Zambia. Article 117 also provided that the Investigator-General was to head the Commission for Investigations. In 1974, the Commission for Investigations Act[26] was enacted to prescribe the operations of the new ombudsman institution.

The Republican Constitution underwent amendments in 1991 and 1996. However, the amendments did not affect the establishment and role of the Investigator-General. The only change brought by the amendments was with regards to the location of the Article establishing this institution.[27] Similarly, some provisions of the Commission for Investigations Act were amended in 1991 and 1995.[28]

2.4 QUALIFICATIONS FOR THE INVESTIGATOR GENERAL AND COMPOSITION OF THE COMMISSION FOR INVESTIGATIONS

The qualifications of the Investigator-General were prescribed by the Republican Constitution, whereas the composition of the Commission for Investigation was provided for by the Commission for Investigations Act.

[25] Ibid, p.38
[26] Chapter 39 of the Laws of Zambia
[27] Annie Chewe-Chanda, 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: The Commission for Investigations and the Permanent Human Rights Commission in Zambia.' (2009) *EISA Research Report No. 43*
[28] Act No. 20 of 1991 and Act No. 11 0f 1995

2.4.1 QUALIFICATIONS FOR THE INVESTIGATOR-GENERAL

Article 90(1) of the 1996 Republican Constitution vested the President with the power to appoint an Investigator-General after consultation with the Judicial Service Commission. Article 90(2) provided for the eligibility for appointment. It provided that a person who qualified to be appointed as an Investigator-General was a person who was eligible to be appointed as a judge of the High Court. This meant that only a person who would qualify to be appointed as a High Court judge was eligible for appointment. Further, the same provision provided that the person appointed was not to be a holder of the office of president, vice-president, minister or deputy minister, or a member of the National Assembly or public officer. The Constitution expressly prohibited those holding public office from being appointed as this would defeat the whole purpose of having an independent official to investigate the conduct of public officers in discharging their duties.

Article 90(3) provided that a person appointed as Investigator-General was to vacate office on attaining the age of sixty-five unless the President permitted that person to continue in office for a period necessary to complete and submit any report on, or anything related to, an investigation that was commenced before attaining the retirement age. Article 90(5) provided that an Investigator-General could be removed from his office for incompetence, misbehavior or inability to perform the functions of his office. A person appointed as Investigator-General was at liberty to resign upon giving three months' notice to the President as per Article 90(2).

2.4.2 COMPOSITION OF THE COMMISSION FOR INVESTIGATIONS

Article 90(1) of the 1996 Republican Constitution provided that the Investigator-General was to be the chairperson of the Commission for Investigations. The Commission for Investigations

Act[29] provided for the establishment of a Commission for Investigations that was to play the role of ombudsman institution.

Section 4 of the Commission for Investigations Act established the Commission for Investigations as consisting of the Investigator-General and three commissioners. Similar to the Investigator-General, the commissioners were appointed by the president. Section 5(1) disqualified a person holding the office of president, vice-president, minister or deputy minister, or member of the National Assembly or public officer from appointment as a commissioner. As earlier alluded to, this was to enhance the independence of the commission as having a person holding public office as a commissioner would conflict with investigating public officers.

A commissioner was to vacate office at the expiration of three years from the date of their appointment as per section 5(2) of the Act. Further, section 5(3) of the Act provided that a commissioner could be removed from office by the president for inability to discharge their functions or for misbehavior. Section 6 of the Commission for Investigations Act provided that the Commission shall employ a secretary and other members of staff. This provision granted the Commission authority to employ a secretary and other members of staff.

2.5 FUNCTONS, JURISDICTION AND POWERS OF THE INVESTIGATOR-GENERAL AND THE COMMISSION FOR INVESTIGATIONS

The 1996 Republican Constitution, in Article 90(13), provided that the functions and powers of the Investigator-General were to be prescribed by an Act of Parliament. The Commission for Investigations Act was enacted for that purpose. The Act, further, provided for the functions, powers and jurisdiction of the Commission for Investigations.

[29] Chapter 39 of the Laws of Zambia

2.5.1 POWERS AND FUNCTIONS OF THE COMMISSION FOR INVESTIGATIONS

The role of the Commission for Investigations was to serve as an impartial and independent institution. It had the function of receiving complaints and allegations of maladministration and abuse of authority from any individual or body corporate at no cost. The operations of the Commission were mostly complaint-driven. A complaint could be made either orally or in writing. However, such complaint or allegation could only be received if made within two years from the date the facts giving rise to the complaint became known to the person making the complaint or allegation as stipulated by section 9 of the Commission for Investigations Act.

The Commission was mandated to investigate the complaints received.[30] However, the Commission had the power to refuse to conduct an investigation where it was satisfied that the complaint or allegation was trivial, frivolous, vexatious or not made in good faith, or where the inquiry would be unnecessary, improper or fruitless. The Commission could also discontinue an investigation for those reasons as per section 10(2) of the Act. Although the Commission was obliged to inform the individual complaining of their decision to discontinue or not investigate a matter, they were not required to inform that individual of the reason for such as per section 10(3) of the Act. Further, there was to be no inquiry in cases where the individual complaining or aggrieved had had the right or opportunity of seeking redress by proceedings in a court, an application or appeal to a tribunal established by law or an application to any executive authority pursuant to section 10(1) of the Act.

The Commission was also mandated to advise the administration informally about the appropriate standards of conduct, and remind and reprieve public officers or institutions that

[30] Annie Kangwa Chewe, *Administrative Law in Zambia* (Claremont: Juta and Company (Pty) Ltd 2020), 226

were slacking.[31] In addition to this, section 20 of the Act mandated the Commission to submit a report of every investigation it conducted to the president. This report was to include recommendations of the Commission. Further, at the end of every year the Commission was required to submit a report on its operations to National Assembly as per section 22 of the Act.

The Commission had the power to make orders, issue writs and give directions that it considered appropriate for the purpose of conducting any investigation where it appeared that an act by a person within the Commission's jurisdiction would prejudice or frustrate any inquiry pursuant to section 12 of the Act. This meant that where the Commission was of the opinion that a person could potentially act in a way that would prejudice the Commission's investigations, the Commission could make orders or directions that it deemed appropriate in order to prevent such acts from interfering or prejudicing an inquiry.

Further, the Commission had the power to summon witnesses and examine them under oath. The Commission could also, by warrant, order the arrest of any person who failed to appear as a witness having been given reasonable notice as stipulated by section 13 of the Act. Additionally, the Commission could also require any person to furnish information or produce documents relevant to an investigation for the purposes of inquiry pursuant to section 14 of the Act.

The Commission also had the power to enter any premises, by warrant, and carry out any inspection for the purposes of an investigation. The only prohibition was if such inspection would prejudice the defence, security or international relations of the country, or would prejudice the investigations or detection of offences as per section 15 of the Commission for Investigations Act.

[31] Annie Kangwa Chewe, *Administrative Law in Zambia* (Claremont: Juta and Company (Pty) Ltd 2020), 226

2.5.2 JURISDICTION OF THE COMMISSION FOR INVESTIGATIONS

Section 8 stipulated that the Commission for Investigations had jurisdiction to inquire into the conduct of any persons to whom the Act applied in the exercise of their office or authority, or in abuse thereof. Section 3(1) listed persons to whom the Act applied. This included persons in the service of the Republic; members and persons in the service of the local authority; members and persons in the service of any institution or organization established by an Act of Parliament or in which government held majority shares, or exercised financial or administrative control; and members or persons in the service of any commission established by the Constitution or any Act of Parliament.

However, the jurisdiction of the Commission did not apply to the president as stipulated in section 3(1) of the Act. Further, the Commission had no jurisdiction or power to question any decision of any court or judicial officer exercising their judicial functions, including decisions of tribunals performing judicial functions, as per section 3(2) of the Commission for Investigations Act.

2.6 CONCLUSION

This chapter has provided an account of the origin of the ombudsman institution and what its intended purpose was. It has labored to show how the institution spread to other parts of the world. Lastly, it has shown how the ombudsman institution was introduced in Zambia, its establishment, its duties, its jurisdiction and its powers. The next chapter addresses the weaknesses and limitations of the Commission for Investigations, and the establishment of the Public Protector of Zambia.

CHAPTER THREE

ESTABLISHMENT OF THE PUBLIC PROTECTOR AS OMBUDSMAN OF ZAMBIA

3.1 INTRODUCTION

The previous chapter discussed the history and establishment of the ombudsman. It went on to discuss the establishment of the Commission for Investigations as the ombudsman institution of Zambia and looked at its structure, functions, powers and jurisdiction. This chapter discusses the ombudsman system currently operational in Zambia. It begins by highlighting the weaknesses and limitations that characterized the Investigator-General and the Commission for Investigations in fulfilling their mandate. This chapter then looks at the reform of the institution that was brought by the Constitution Amendment Act No. 2 of 2016. It highlights the newly established institution (Public Protector) under a new mandate and legal framework.

3.2 WEAKNESSES AND LIMITATIONS OF THE COMMISSION FOR INVESTIGATIONS

The establishment of the office of Investigator-General and the Commission for Investigations was a good attempt at addressing maladministration, malfeasance and administrative injustice, and ensuring that civil servants discharged their functions efficiently and within the law. However, in practicality, the Investigator-General and the Commission were characterized by limitations and weaknesses that greatly affected their efficacy in delivering on their mandate.[1] Some of these weaknesses are discussed below.

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[1] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

3.2.1 LIMITED POWER AND JURISDICTION

Although the Commission for Investigations and the Investigator-General were mandated to deal with complaints relating to arbitrary use of authority and administrative injustice, the only complaints that could be dealt with were limited to those relating to civil servants under the service of the Republic as per section 3 of the Commission for Investigations Act. This meant that the Investigator-General and the Commission had no authority to investigate complaints that went beyond mere civil servants and those relating to officials that headed various government departments and statutory bodies.

Furthermore, the Commission and the Investigator-General were not bestowed with enforcement powers. Although the Commission had power to make orders and directions as per section 12 of the Act, it had no power to enforce any action after concluding an inquiry or investigation. The Commission had no power to prosecute or hand down judgments. It was only empowered to make recommendations detailing measures or compensation it viewed as appropriate to atone for wrong-doing, if any.[2] This limited the effectiveness of the institution in the sense that despite conducting an exhaustive investigation and detailing appropriate action to be taken, there was no guarantee that the recommendations would be taken up or acted upon by the president.

3.2.2 LACK OF FORMAL COORDINATION WITH OTHER INSTITUTIONS

In addition to its limited power and jurisdiction, another major weakness was that the Commission lacked a formal mechanism or legal framework of coordinating with other institutions. Coordination was an important factor because some cases of maladministration and administrative injustice bordered on corruption and human rights abuses which were strictly

[2] Annie Chewe-Chanda, 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: The Commission for Investigations and the Permanent Human Rights Commission in Zambia' (2009) *EISA Research Report No. 43*

within the jurisdiction of other institutions. Although the Commission could coordinate with other institutions informally by referring cases to the appropriate agency and vice versa, there was no legal framework to provide for a follow-up procedure on the progress of cases that had been referred to other agencies. This meant that many such cases of maladministration went unsolved as reported by the 2005 Constitution Review Commission.[3] This limited the ability of the institution to address some cases of maladministration.

3.2.3 FINANCIAL CONSTRAINTS

The Commission for Investigations was reportedly a severely underfunded institution by the government.[4] Consequently, the Commission's operations were not extensive as it often had insufficient operational funds to thoroughly investigate all complaints. Operational funds, in this context, refer to resources that were needed to move from district to district in order to attend to various complaints in those districts.[5] This limited how efficient the institution was in addressing complaints and consequently limited its effectiveness of delivering on its mandate.

3.2.4 HUMAN RESOURCE CONSTRAINTS

In addition to its financial constraints, the Commission also faced human resource constraints. Excluding the Investigator-General and Commissioners, the Commission faced a major shortage

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[3] PATMAT Legal Practitioners, 'Anti-Corruption Legal Assessment' <https:www1.worldbank.org/publicsector/civilservice/epublishdocs/NewAssets/legislation/Zambia/ZambiaAClegalAssessmentstudy.pdf> Accessed on: 01/06/2021

[4] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

[5] PATMAT Legal Practitioners, 'Anti-Corruption Legal Assessment' <https:www1.worldbank.org/publicsector/civilservice/epublishdocs/NewAssets/legislation/Zambia/ZambiaAClegalAssessmentstudy.pdf> Accessed on: 01/06/2021

of adequately qualified members of staff.[6] As a result, this led to a severe case of understaffing that inhibited the institution from fully addressing matters within its purview.

Further, although the Commission for Investigations Act provided that the Commission could employ its own members of staff, this was not practically possible because all the positions, excluding the Investigator-General and the commissioners, were Civil Service positions. This resulted in all the Commission's staff being drawn from the Civil Service by way of transfer from other government departments. Potentially, this created a conflict of interest as the members of staff were then tasked with investigating the very government departments they came from.[7] Consequently, this has been argued to have limited the effectiveness of the Commission for Investigations.

3.2.5 LACK OF AWARENESS AMONG CITIZENS AND INACCESSIBILITY

Although the Commission had over the years conducted sensitization programs meant to make the public aware of its mandate and purpose through radio broadcasts and workshops, such programs were found to be inadequate to fully inform the public. Many people were still not conversant with the work of the Commission and very few understood its mandate.[8] Additionally, because the Commission operated in *camera* and did not publicize its operations, many citizens were not aware of the institution's existence and role.

Furthermore, the location of the Commission for Investigations limited citizens' accessibility to the institution. The Commission was not easily accessible to majority of the citizens because it

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[6] Ibid

[7] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

[8] Annie Chewe-Chanda, 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: The Commission for Investigations and the Permanent Human Rights Commission in Zambia.' (2009) *EISA Research Report No. 43*

only had offices in Lusaka.[9] This meant that individuals from other parts of the country had to expend time and money to access the institution's services.

3.2.6 OTHER LIMITATIONS AND WEAKNESSES

There was a lack of independence. This was deduced from the fact that the Investigator-General answered to the executive which was the branch whose departments it was to investigate.[10] Further, the Commission had to seek permission from the Executive in order to investigate certain cases as per section 8 and 21 of the Commission for Investigations Act. The president could also bar the Commission from further inquiry into a matter as per section 21 of the Act.

In addition, there was a lack of transparency. The operations of the Commission were not publicized and were not open to scrutiny by the public.[11] The Commission could also discontinue investigations or choose not to investigate matters without giving a reason to the individual complaining as per section 10(3) of the Commission for Investigations Act thereby reducing its effectiveness addressing citizen's complaints.

Lastly, the institution was poorly run and disorganized. Some complaint files could not be traced as revealed by audit reports. The institution also failed to issue reports every year and when it did, their issuance was often delayed.[12]

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[9] PATMAT Legal Practitioners, 'Anti-Corruption Legal Assessment' <https:www1.worldbank.org/publicsector/civilservice/epublishdocs/NewAssets/legislation/Zambia/ZambiaAClegalAssessmentstudy.pdf> Accessed on: 01/06/2021

[10] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

[11] Ibid

[12] Ibid

Given these many limitations and weaknesses that made the institution ineffective in delivering on its mandate, it is not surprising that the Commission for Investigations and the Investigator-General became major targets for reform.

3.3 ESTABLISHMENT OF THE PUBLIC PROTECTOR OF ZAMBIA

As earlier alluded to, the Commission for Investigations was coupled with many weaknesses and limitations. Due to the many weaknesses and limitations that rendered the Commission for Investigations ineffective, there was need to reform the establishment and role of the institution.[13]

Measures to reform the institution began as early as 1995. In 1993, a constitution review commission was appointed by President Fredrick Chiluba. This Commission (Mwanakatwe Commission) was chaired by Mr. John Mwanakatwe and was tasked with the duty of receiving submissions that would be pivotal to the enactment of a new constitution that was to replace the 1991 Republican Constitution. The terms of reference for the Mwanakatwe Commission required the Commission to recommend, among other things, a constitution that would ensure state organs operated to maximum checks and balances. This meant a reform to the mechanisms that ensured checks and balances.[14]

The Mwanakatwe Commission received several submissions to the effect that the Investigator-General and the Commission for Investigations had failed to effectively fulfill their mandate. The Commission for Investigations had not been able to effectively hold public officers accountable

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[13] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46
[14] Alfred Chanda, *Constitutional Law in Zambia: Cases and Materials* (University of Zambia Press 2012), 217-221

for failure to discharge their functions accordingly.[15] Consequently, the Mwanakatwe Commission recommended the change of Investigator-General from executive ombudsman to a parliamentary ombudsman that was accountable to the National Assembly as opposed to being accountable to the president. This was to enhance the independence of the institution. The Commission also recommended a change of name from Investigator-General to Parliamentary Ombudsman. Lastly, the Mwanakatwe Commission also recommended that the ombudsman be given the power to not only investigate but redress complaints of maladministration and abuse of authority as well.[16]

Unfortunately, like most of the recommendations made by the Mwanakatwe Commission, these recommendations were not enacted in the 1996 Republican Constitution.[17]

Another attempt to reform this institution was made in 2005. In 2003, President Levy Patrick Mwanawasa appointed a constitution review commission chaired by Mr. Wila Mung'omba (the Mung'omba Commission). The purpose of this Commission was to review the Constitution and make recommendations on the amendments to be made. Among other things, the Mung'omba Commission recommended the abolishment of the Investigator-General and the Commission for Investigations. These were to be replaced by a Parliamentary Ombudsman Office. The Mung'omba Commission also recommended that the Parliamentary Ombudsman be given the enhanced powers to investigate and prosecute cases of maladministration and abuse of office. This Parliamentary Ombudsman was to be accountable to the National Assembly.[18]

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[15] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46
[16] Ibid.
[17] Alfred Chanda, *Constitutional Law in Zambia: Cases and Materials* (University of Zambia Press 2012), 217-221
[18] Constitution Review Commission, *Report of the Constitution Review Commission* (2005), 630-637

The Mung'omba Commission also recommended that in order to enhance the independence of the Parliamentary Ombudsman and other investigative wings, the commissions must manage their finances independently. The investigative commissions were also to conduct public education and awareness programs on their mandate and roles.[19]

However, the Republican Constitution was only amended in 2016. On 5th January, 2016, President Edgar Chagwa Lungu signed Act No. 2 of 2016 into law. This is the Constitution of Zambia (Amendment) Act of 2016. It, among other things, transformed the Office of the Investigator-General into the Public Protector. The Commission for Investigations was also abolished by this amendment.[20] Some of the recommendations made in 1995 and 2005 were taken up in the 2016 amendment as will be illustrated later.[21]

The Constitutional Court in case of the *Public Protector of the Republic of Zambia v Indeni Petroleum Refinery Company Ltd*[22] reiterated that the mischief which the legislature intended to cure with the 2016 Constitution of Zambia (Amendment) Act was the ineffectiveness of the Investigator-General in fulfilling its mandate. Furthermore, besides curing the ineffectiveness of the ombudsman, the amendment was also meant to foster the independence and boost the efficiency of the ombudsman as a mechanism of investigation and enforcement.

This amendment addressed the long overdue need to reform the ombudsman of Zambia. The Commission for Investigations Act was repealed and replaced with the Public Protector Act.[23]

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[19] Ibid

[20] Caroline Sokoni, 'The Role of the Public Protector/Ombudsman' (2018) <https:www.laz.org.zm/wp-content/uploads/2018/08/Role-of-the-Public-Protector-Ombudsman-Mrs-Caroline-C.Z.-Sokoni.pptx> Accessed on: 01/06/2021

[21] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

[22] Selected Judgment No. 16 of 2019

[23] Act No. 15 of 2016

This Act, as elucidated in its preamble, prescribes the functions, powers, jurisdiction and operations of the Public Protector.

The Public Protector is established as both an ombudsman institution and an official. This means that the ombudsman institution is to be referred to as the Office of the Public Protector and similarly, the individual heading it is the Public Protector.

3.4 THE ROLE AND MANDATE OF THE PUBLIC PROTECTOR

The exact role and mandate that the Public Protector plays in Zambia is not expressly stated in both the Constitution of Zambia (Amendment) Act and the Public Protector Act. However, the Constitutional Court of Zambia, in the case of the *Public Protector of the Republic of Zambia v Indeni Petroleum Refinery Company Ltd*, clearly explained the role of the Public Protector. The Court stated that the Office of Public Protector was created with the mandate of ensuring good governance and integrity in public administration. It was created to promote constitutional democracy by ensuring that those entrusted with public office and discretionary powers discharge their duties within the prescribed laws and do so efficiently.

It is argued that the current Public Protector model in Zambia is borrowed from the South African model.[24] As such, the purpose and mandate of the Public Protector of Zambia is similar to that of the South African Public Protector. South African jurisprudence has over the years elucidated the role and purpose of the Public Protector in a democratic nation.

[24] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

In the case of the *President of the Republic of South Africa and others v South African Rugby Football Union and others*[25], it was explained that the Public Protector is a mechanism of constitutional control aimed at maintaining efficient and ethical public administration. It is mandated to ensure that public officers are accountable for their acts to the public. The Public Protector provides a defence against maladministration and malfeasance in public office as these have the potential of undermining good public administration as a tenet of democracy.[26]

In addition, the Constitutional Court of South Africa in *Economic Freedom Fighters v Speaker of the National Assembly and others*[27] stated that the Public Protector has a duty to uproot impropriety, abuse of authority and prejudice by public officers in state institutions. Further, that the Public Protector is an essential factor in the furtherance of good governance in a democracy.

Conclusively, it is abundantly clear that the Public Protector occupies a very important place in a democratic nation. It not only ensures good public administration and good governance by those in public institutions and public office, but also protects citizens against maladministration.

3.5 QUALIFICATIONS AND TENURE FOR THE PUBLIC PROTECTOR AND THE COMPOSITION OF THE OFFICE OF PUBLIC PROTECTOR

The qualifications and tenure for the Public Protector are prescribed by the Constitution Amendment Act of 2016. The composition of the Office of the Public Protector, on other hand, is prescribed by the Public Protector Act.

[25] 2000 (1) SA A (CC)

[26] *The Public Protector v Mail and Guardian Ltd and Others* [2011]SA 420 SCA

[27] [2016] ZACC 11

3.5.1 THE QUALIFICATIONS AND TENURE OF THE PUBLIC PROTECTOR

The Constitution of Zambia (Amendment) Act sets out the qualifications for eligibility to hold the Office of Public Protector. Article 243(1) provides that the Public Protector shall be appointed by the president, on the recommendation of the Judicial Service Commission, subject to ratification by the National Assembly. Article 243(2) sets out the qualifications that make a person eligible for appointment as Public Protector. It provides that a person eligible for appointment is one qualified to be appointed as a judge and does not hold a state office or constitutional office. The provision does not specify to what court such person may be eligible for appointment as a judge, but generalizes it to just appointment as a judge. Judge is defined in Article 266 as a person appointed as a judge of the superior court. The same provision defines superior court to include Supreme Court, Constitutional Court, Court of Appeal and the High Court. It can therefore be concluded that a person that qualifies to be appointed as the Public Protector must be eligible to be appointed to any of the superior courts.

Article 247 of the Constitution of Zambia (Amendment) Act provides for the tenure of Office of Public Protector. Article 247(1) provides that the Public Protector shall retire from office on attaining the age of sixty. However, Article 247(2) provides that the Pubic Protector may retire, with full benefits, on attaining the age of fifty-five. This means that the Constitution gives the Public Protector the liberty to retire upon reaching the age of fifty-five if he/she wishes.

Article 247(3) provides that the Public Protector may be removed from office on the same grounds and procedure as apply to a judge. The grounds upon which a judge may be removed are provided under Article 143. It provides that a judge may be removed from office on the grounds of a mental or physical disability that makes the judge incapable of performing judicial

functions, incompetence, gross misconduct, or bankruptcy. Article 144 establishes the procedure for removal of a judge. This, as alluded to, also applies to the Public Protector.

Article 247(4) permits the Public Protector to resign from office. It provides that the Public Protector may resign from office by giving three months' notice, in writing, to the president.

Article 246 provides for the performance of the functions of the Public Protector during absence, illness or any other cause. It provides that where the Public Protector is unable to perform the functions of office due to absence from Zambia, illness or other cause, the president shall appoint a person qualified to perform the functions of the Public Protector until that appointment is revoked or until the Public Protector returns to the office.

3.5.2 THE COMPOSITION OF THE OFFICE OF THE PUBLIC PROTECTOR

The Public Protector Act provides the composition of the Office of the Public Protector. Section 4(1) of the Act provides that the Office of the Public Protector shall be headed by the Public Protector. Section 4(2) of the Act establishes the composition of the Office of the Public Protector. It provides that the Office of the Public Protector shall consist of two Deputy Public Protectors, the Registrar, Chief Administrator and other officers and staff appointed pursuant to the Act. The two Deputy Public Protectors, the Registrar, and the Chief Administrator and other officers who assist the Public Protector are all appointed by the Parliamentary Service Commission on recommendation of the Public Protector pursuant to sections 7(1), 8(1) and 9 of the Public Protector Act respectively.

Section 9(4) gives the Public Protector power to appoint experts and assessors as may be necessary to assist the Public Protector in carrying out functions. Further, section 10 provides that the Parliamentary Service Commission shall, on the recommendation of the Public Protector,

appoint such number of provincial directors and district investigations officers as may be necessary to perform the functions of the Public Protector.

These different members of staff, in all, make up the composition of the Office of the Public Protector. It can be noted that the composition of the institution has been extended from what constituted the Commission for Investigations.

3.6 THE FUNCTIONS, POWERS AND JURISDICTION OF THE OFFICE OF THE PUBLIC PROTECTOR

The functions, powers and jurisdiction of the (Office of the) Public Protector are prescribed by both the Constitution of Zambia (Amendment) Act and the Public Protector Act.

3.6.1 FUNCTIONS AND POWERS OF THE (OFFICE OF THE) PUBLIC PROTECTOR

The functions and powers of the Public Protector are provided by the Constitution of Zambia (Amendment) Act and the Public Protector Act, whereas the functions of the other members that constitute the Public Protector Office are only provided under the Public Protector Act.

Article 244(1) of the Constitution provides that the Public Protector may investigate an action or decision taken or omitted to be taken by a state institution in the performance of an administrative function. This provision gives the Public Protector extensive powers to initiate investigations into the conduct of state institutions in the performance of their administrative functions and hold the institutions accountable for their decisions. Article 244(2) qualifies the kind of action or decision taken that may be investigated. It provides that these are actions or decisions that are unfair, unreasonable, illegal or not compliant with the rules of natural justice.

Article 244(3) of the Constitution gives the Public Protector power to bring an action before a court, hear an appeal by a person relating to an action or decision taken or omitted in respect to that person, and to make a decision on an action to be taken against a public officer or Constitutional office holder, which shall be implemented by the appropriate authority.

Article 244(5) gives the Public Protector the same powers as those of the High Court regarding the enforcement of orders. It provides that the Public Protector has the same powers as those of the High Court in enforcing the attendance of witnesses and examining them on oath, examining witnesses outside Zambia, compelling the production of documents, enforcing decisions issued by the Public Protector, and citing a person for contempt for failure to carry out a decision. Although the Public Protector has the same powers as that of the High Court with regards to enforcement of orders, it is not a court and does not rank equivalently with the High Court as was stated by the Constitutional Court of Zambia in the case of the *Public Protector of the Republic of Zambia v Indeni Petroleum Refinery Company Ltd*.

Apart from the functions and powers provided in the Constitution, the Public Protector Act also provides additional functions for the Public Protector and gives powers to the Public Protector. Section 6(2) of the Act provides additional functions of the Public Protector as follows:

a. To consider the administrative actions, practices and procedures of state institutions and make recommendations to the state institutions on appropriate ways of addressing the effects of inappropriate administrative actions and for improvement of practices and procedures.
b. To prevent and take necessary and effective measures for prevention of maladministration in state institutions.

c. To initiate, receive and investigate complaints of alleged or suspected maladministration.
d. Investigate any complaint of human rights arising out of maladministration.
e. To be lead agency in matters of combating maladministration.
f. To adopt and strengthen mechanisms for educating the public in order to create awareness in the fight against maladministration and develop educational programs for the sensitization of the media.
g. To provide information to state institutions for the improvement of administrative practices and procedures.
h. To monitor and evaluate administrative activities and standards in state institutions, and issue reports on matters of public interest.
i. To advise government on good administrative practices.

All these functions are in addition to the ones already provided by Article 244 of the Constitution. These extended functions are meant to enhance the effectiveness of the institution.

The Public Protector Act also gives additional powers to the Public Protector not provided for in the Constitution of Zambia (Amendment) Act. Section 6(4) of the Public Protector Act provides that the Public Protector may investigate an action despite a provision in any written law to the effect that the decision or action complained of is final. Final, in this case, means not subject to appeal, challenge or review as per section 6(5). What this means is that even if a law gives a person or institution under the jurisdiction of the Public Protector power to make a decision that is final and not appealable, the Public Protector still has power to inquire into such an action. This effectively affords more power to the Public Protector than was the case with the Investigator-General.

Other members of the Office of the Public Protector have other functions as provided by the Act. The Deputy Public Protectors perform functions assigned to them by the Public Protector as per section 7(3) of the Act. Additionally, section 7(4) provides that one Deputy Public Protector is responsible for the formation of policy on specialized systematic investigations on maladministration, while the other Deputy Public Protector is responsible for the formulation of policy on investigations on general maladministration.

The Registrar performs administrative functions as provided by section 8(3) of the Act which include issuing summonses, search warrants, arrest warrants and orders made by the Public Protector; receiving complaints from complainants against state institution; communicating to the complainant and state institution the decisions and orders of the Public Protector; and keeping a record of the investigations and proceedings, among other functions.

Section 9(2)(b) provides that the Chief Administrator is responsible for the management and administration of the Office of the Public Protector. Further, officers perform such functions and duties as provided for by law or delegated by the Public Protector. The provincial director is responsible for supervising the operations of the Office of the Public Protector in a province, whereas the district investigations officers are responsible for supervising the operations in a district as per section 10(2) and 10(3) of the Public Protector Act.

Conclusively, the members that compose the Office of the Public Protector perform various functions provided by law and/or those delegated by the Public Protector. It may be argued that this decentralization of functions has increased the efficiency of the institution in performing its duties and fulfilling its mandate.

3.6.2 JURISDICTION OF THE PUBLIC PROTECTOR

The jurisdiction of the Office of the Public Protector is provided by the Constitution of Zambia (Amendment) Act of 2016 in Article 244(1). It provides that the Public Protector may investigate an action or decision taken by a state institution. This establishes that the Public Protector has the jurisdiction to inquire into the conduct of any state institution. A state institution is defined in Article 266 of the Constitution as including a ministry or government department, a public officer, agency, institution, statutory body, commission or company in which government or local authority has controlling interest. State institution, however, does not include a state organ, namely; the Legislature, Executive and Judiciary as per Article 266. This means that the members of the Legislature, Executive and the Judiciary are not subject to the jurisdiction of the Public Protector.

Article 245 also provides the limitations of the powers and jurisdiction of the Public Protector. It provides that the Public Protector shall not investigate a matter which is before a court, court martial or a quasi-judicial body; a matter which relates to an officer in the Parliamentary Service or Judicial Service; a matter that involves the relations or dealings between government and foreign government or an international organization; a matter that relates to the prerogative of mercy; or a matter that is criminal in nature. This clearly sets a limit to the jurisdiction of the Public Protectors powers of inquiry as its jurisdiction cannot be extended to the abovementioned matters.

3.7 CONCLUSION

This chapter has endeavored to provide an account of the weaknesses and limitations of the Investigator-General and the Commission for Investigations. It has then narrated the efforts that

were made and that eventually led to the reformation of the ombudsman institution of Zambia. This chapter has also provided an account of the present ombudsman institution in Zambia being the Public Protector. It has addressed the Public Protector's establishment, its mandate and role, its functions, its powers and its jurisdiction. The next chapter will address some of the perceived weaknesses and limitations of the Public Protector.

CHAPTER FOUR

ASSESSMENT OF THE PUBLIC PROTECTOR'S EFFICACY IN ITS OPERATIONS AND IN FULFILMENT OF ITS MANDATE

4.1 INTRODUCTION

This chapter endeavors to assess the efficacy of the Office of the Public Protector in its operations and in fulfilling its mandate. It begins by highlighting the shortcomings of the Commission for Investigations that were addressed by the establishment of the Office of the Public Protector. Further, it addresses some of the positive safeguards and enhanced powers of the Public Protector that are in place as introduced by its establishment to ensure the effectiveness of the office. The chapter then assesses some of the limitations and weaknesses of the Office of the Public Protector. It also looks at how these limitations and weaknesses affect the efficacy of the Public Protector.

4.2 SHORTCOMINGS OF THE COMMISSION FOR INVESTIGATIONS THAT WERE ADDRESSED BY THE ESTABLISHMENT OF THE PUBLIC PROTECTOR

As highlighted by the Constitutional Court of Zambia in the *Public Protector of the Republic of Zambia v Indeni Petroleum Refinery Company Ltd*[1], the mischief which the legislature intended to cure with the Constitution of Zambia (Amendment) Act of 2016 was the ineffectiveness of the Investigator-General in fulfilling its mandate. To do this, the legislature addressed the many shortcomings of the Commission for Investigations and the Investigator-General. This is highlighted below.

[1] Selected Judgment No. 16 of 2019

4.2.1 WIDER POWERS AND JURISDICTION

The establishment of the Public Protector gave wider jurisdiction to the ombudsman institution. The Constitution of Zambia (Amendment) Act of 2016 encompasses all state institutions as per Article 244. State institutions, as defined by Article 266, not only includes public officers and civil servants, but encompasses ministries, government departments, statutory bodies, commissions and parastatals. This has ensured an increase in the number of public officers and institutions that are subject to the Public Protector's jurisdiction.

In addition, as earlier alluded to, Article 244(3) of the Constitution of Zambia (Amendment) Act now empowers the Public Protector to bring an action before a court; hear an appeal by a person relating to an action or decision taken or omitted in respect to that person; and to make decisions on actions to be taken against public officers. This has granted more powers to the Public Protector with respect to enforcement. This power enables the Public Protector to make a more impactful fulfillment of its mandate as it does not depend on other powers to provide remedial actions or enforce its findings and decisions.

4.2.2 LEGAL FRAMEWORK FOR COORDINATION WITH OTHER INSTITUTIONS

The enactment of the Public Protector Act has ensured that there is a formal mechanism for coordination with other institutions. Section 17 of the Act provides that the Public Protector may at any stage of dealing with a matter refer the matter to a relevant authority. Presumably, these are matters within the jurisdiction of other institutions such as the Anti-Corruption Commission and the Human Rights Commission. Section 18 of the Act guarantees collaboration on investigations. It provides that where the Public Protector is investigating a matter being dealt with by an institution it referred a matter to or had begun investigating that matter, it may

continue to investigate or decide on the matter and share its findings with the institution concerned, or request a report from the institution it referred the matter to. The Public Protector is also empowered to join the other institution in investigating the matter and produce a joint report. This has introduced a system of coordination between the Public Protector and other institutions in overlapping matters. This is important as it allows cases with different misdeeds that subject to the jurisdiction of different authorities to be formally and coordinately addressed.

4.2.3 MORE INDEPENDENCE OF THE INSTITUTION

The establishment of the Public Protector has fostered more independence of the ombudsman institution. The Constitution provides, in Article 248, that the Public Protector shall report to the National Assembly on matters concerning its affairs. This has fostered more independence in the sense that the institution can freely investigate departments and officers from the Executive branch of government without having to answer to that same branch as was the case with the Commission for Investigations. It is only accountable to the National Assembly.

4.2.4 MORE FINANCIAL CONTROL AND INDEPENDENCE

In addition to the increased independence, the institution has also been given more financial control and independence. Part VI of the Public Protector Act contains financial provisions. Section 31(1) provides that the funds of the Office of the Public Protector shall consist of monies as may be appropriated by parliament; as may be paid to the Office by way of fees, loans, grants and donations; and as may vest in or accrue to the Office. Further, section 31(2) provides that the Office may accept monies by way of grants or donations from any source within or outside Zambia, and may raise monies required for discharging its functions by way of loans. This is all subject to the minister’s approval.

Section 31(4) of the Act provides that the Office may also invest funds not needed for discharging its functions on approval by the minister. Essentially, this means that the Office is permitted to raise its own money through various investments. Further, section 31(4) also provides that the operational expenses and other expenses shall be paid from the funds of the Office of the Public Protector.

As can be noted, the introduction of these provisions was meant to foster more financial control and stability of the institution. By providing a legal framework, the Office is entitled by law to adequate funding from government and may further raise its own funds. This has been a positive introduction compared to what was experienced with the Commission for Investigations.

4.2.5 MORE HUMAN RESOURCE

The introduction of the Public Protector system has also addressed the human resource constraints that stifled the Commission for Investigations system. The Public Protector Act has introduced a wider composition of the institution. Other than the Public Protector, section 4(2) of the Act provides that the Office of the Public Protector shall consist of two Deputy Public Protectors, the Registrar, Chief Administrator and other officers and staff such as provincial directors and district investigations officers. The Public Protector Act has introduced more officers that are to assist the Public Protector with the administration and management of the institution.

In addition, the officers of the Office of the Public Protector are now more qualified. The two Deputy Public Protectors are required to have at least ten years of experience in finance, public administration or law as per section 7(4)(b) of the Public Protector Act, while the Registrar is required to have at least five years of legal experience as per section 8(2).

Furthermore, the Public Protector Act provides that the members of staff of the Office of the Public Protector shall be paid from the funds of the Office of the Public Protector. Section 31(4)(a) of the Act provides that the emoluments of the members of staff shall be paid from the funds of the Office. Further, section 31(3)(b) provides that other allowances for members of staff engaged on the business of the Public Protector shall also be paid from the funds of the Office.

These provisions have not only been introduced to remedy the issue of understaffing experienced by the Commission for Investigations but also further the financial control of the Office in relation to its members of staff. This gives the Office the financial ability to employ sufficient members of staff required to meet the operational requirements of the Office.

4.2.6 SENSITIZATION AND EDUCATION OF THE PUBLIC AND ACCESSIBILITY OF THE INSTITUTION

The Public Protector Act now includes a legal framework for sensitizing and educating the public on the role of the Public Protector in Zambia. The Public Protector Act makes it a statutory function for the Public Protector to raise awareness among the citizens on the role of the Public Protector and maladministration, among other things. Section 6(2)(f) provides that the Public Protector is to adopt and strengthen mechanisms for educating the public on the fight against maladministration and related offences, respect of ethics, and the negative effects of maladministration. Further, to develop educational and other programmes for the sensitization of the media.

The implication of this is that by law, the Public Protector is required to ensure that it puts in place mechanisms and programmes that will educate the public on maladministration and the role that the Public Protector plays in curbing maladministration.

In addition, the institution has also decentralized its offices to other parts of the country. The Constitution, in Article 243(3), provides that the Office of the Public Protector shall be decentralized to the provinces and progressively to the districts. The implication is that more people will have access to the institution without having to expend time and money to travel to one city in order to access the institution as was the case with the Commission for Investigations.

In conclusion, there are many structural and operational amendments that have been made for the purpose of improving the functionality and efficacy of the institution. This depiction of the changes is illustrative and not exhaustive of that fact.

4.3 THE LIMITATIONS AND WEAKNESSES OF THE PUBLIC PROTECTOR AND HOW THEY AFFECT THE DISCHARGE OF ITS MANDATE

It is abundantly clear that there have been many progressive provisions that have been enacted in both the Constitution and the Public Protector Act meant to enhance the efficacy of the Public Protector. However, the new Public Protector system still faces limitations and weaknesses that dent the efficacy of the institution. These weaknesses and limitations are discussed below.

4.3.1 LACK OF IMPLEMENTATION OF THE NEW PUBLIC PROTECTOR SYSTEM

The biggest weakness of the Public Protector system thus far is the total lack of implementation of the new system by government. As earlier alluded to, the 2016 Constitution Amendment Act was a much needed enactment to, among other things; remedy the weaknesses and limitations experienced by the ombudsman institution in Zambia over the years of its existence. The Constitution of Zambia (Amendment) Act of 2016 and the Public Protector Act have introduced many progressive provisions that were enacted to establish the Public Protector and enhance the

effectiveness of the ombudsman institution in fulfilling its mandate and commanding confidence from members of the public.

Although the law was enacted for the right reasons, there has been failure to implement the new ombudsman system. In April 2021, the Parliamentary Committee on Legal Affairs, Human Rights, National Guidance, Gender Matters and Governance noted that 'there has been inordinate delay in granting treasury authority to enable actualization of the organizational structure for the Office of the Public Protector.'[2] Since the establishment of the Public Protector in 2016, the government has not funded the institution for the purpose of enabling it to implement its new structure. The Parliamentary Committee also noted that without this funding and treasury authority, the structure of the Office of the Public Protector cannot be actualized.

Although the Office has assumed its new name and powers, it continues to operate using its old structure and *modus operandi*.[3] The implication of this is that progressive structural provisions that have been established by the Public Protector Act such as the new composition of the Office; its financial capacity and independence; its framework for public sensitization; and its decentralization to all provinces, among other things, remain non-functional as there have been no positive steps to implement the new structure.

Among other things, the institution continues to operate only in Lusaka; continues to be financially dependent on its budget allocation from government; continues to face the same human resource constraints; and still has not put measures in place to sensitize the public on the role and mandate of the institution. This in itself waters down what is meant to be an effective

[2] National Assembly of Zambia, *Report of the Committee on Legal Affairs, Human Rights, National Guidance, Gender Matters and Governance for the Fifth Session of the Twelfth National Assembly* (2021)
[3] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46

institution in fulfilling its mandate. The institution therefore continues to exhibit the same ineffectiveness that its predecessor exhibited as it continues to operate using the same *modus operandi* and structure.

The take-home point is that the Office of the Public Protector is still stifled by the weaknesses and limitations that engulfed the Commission for Investigations. This is despite the efforts made through the Constitution of Zambia (Amendment) Act and the Public Protector Act to enhance the efficacy of the ombudsman institution. This greatly diminishes the efficacy of the Office.

4.3.2 LIMITED JURISDICTION *VIS-A-VIS* TOP GOVERNMENT OFFICIALS

The classical rationale for the establishment of an ombudsman institution is the need to promote good governance and public administration as major tenets of democracy.[4] The purpose of an ombudsman is to play an administrative oversight role over the actions of public administrators in the Executive branch of government. The Public Protector acts as a mechanism that enforces accountability by checking and monitoring public administration in the exercise of its duties. It ensures that these duties are carried out within the law, without undue delay and in a fair and reasonable manner.[5] Essentially, the role of the Public Protector is to hold the government and its agents accountable for maladministration.

One of the main constraints that limit the Public Protector's ability to fulfill its role is the issue of jurisdiction. Although the Constitution of Zambia (Amendment) Act provides for the limitations of powers of the Public Protector in Article 245, these limitations are only with regards to the matters that the Public Protector is precluded from investigating. Therefore, the Constitution of

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[4] Chagwagwa Edison Fani, 'Evaluating the Ombudsman: a Preliminary Investigation of South Africa and Botswana' *(*Master's thesis, University of Cape Town 2005)

[5] Tchawauo Mbiada, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realization of the Right to Access Adequate Housing in South Africa' (*2017) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 20*(1)

Zambia (Amendment) Act and the Public Protector Act do not expressly set out the offices that are not subject to the jurisdiction of the Public Protector.

Although the Constitution of Zambia (Amendment) Act of 2016 extended the jurisdiction of the Public Protector, the jurisdiction of the Public Protector still does not encompass top government officials such as ministers. Article 244(1) provides that the Public Protector has the power to investigate an action or decision taken or omitted by a state institution. Although state institution includes a ministry as per Article 266, it does not include a state organ such as the Executive.

The rules of statutory interpretation come to the fore when considering these provisions. In the landmark case of *Sussex Peerage Case*[6], Lord Tindal CJ reiterated that, 'if words of the statute are in themselves precise and unambiguous, then no more can be necessary to expound those words in their natural and ordinary sense. The words themselves alone best declare the intention of the lawgiver.' The literal rule of statutory interpretation is the predominant rule of statutory interpretation as illustrated by the Constitutional Court in *Hakainde Hichilema and another v Edgar Lungu and others*[7] where the court reasoned that the Constitution should be interpreted in a manner that gives words their plain, ordinary and literal meaning.

In application, the words in Article 244(1) expressly and precisely set out who is amenable to the jurisdiction of the Public Protector. The literal interpretation of statutes, as reiterated by Justice Bweupe in *Mutale v Attorney General*[8], espouses that the construction of words should be taken in their literal meaning in which the words are used in common parlance. The literal interpretation of Article 244(1) means that members of the Executive such as cabinet ministers are not subject to the jurisdiction of the Public Protector despite the ministry they head being

[6] [1884] 8 ER 1034
[7] (2016/CC/0031) [2016] ZMCC 4
[8] [1979] ZR 139

subject to it. Article 116(2) provides that a minister shall be responsible for the policy and strategic direction of a ministry, department or other state institution as assigned by the president.

Read together, this means that despite having the executive power to run a ministry, a minister is not subject to oversight by the Public Protector regarding any potential case of maladministration. The minister is immune from the oversight of the Public Protector in its conduct and decision making, and the actions of a minister cannot be investigated. In the grand scheme of things, this situation is inefficacious in curbing maladministration in ministries.

The South African jurisdiction holds a different position. In contrast to Zambia, the Public Protector of South Africa has the power to investigate any conduct in state affairs or public administration that is alleged or suspected to be improper or to result in impropriety.[9] Section 182(1) of the South African Constitution[10] gives the Public Protector power to investigate any conduct in any sphere of government, report that conduct, and to take remedial action. The Public Protector is constitutionally mandated to investigate and report any maladministration on the part of government, including top officials such as ministers.[11] This reflects the classical mandate of the ombudsman to uproot impropriety and abuse of power in state affairs. Top government officials are endowed with extensive powers and are therefore more likely to abuse these powers.[12] It is therefore counterproductive to immunize officials endowed with extensive powers from oversight of the Public Protector.

[9] Tchawauo Mbiada, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa (*2017) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 20*(1)

[10] Constitution of the Republic of South Africa, 1996

[11] Tchawauo Mbiada, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa (*2017) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 20*(1)

[12] Constantine Theophilopoulos & Ala C. De Matos, 'An analysis of the Public Protector's Investigatory and Decision-Making Procedural Powers' (*2019) PER: Potchefstroomse Elektroniese Regsblad 22(1)*, 1-28.

The Zambian position regarding ministers is inefficacious in the sense that the minister responsible for a ministry cannot be subject to oversight for maladministration even though such a ministry is subject to oversight. It creates a situation where top officials are immunized against being held accountable for maladministration. This contributes to the inefficacy of the Public Protector as the institution cannot be said to fully fulfill its mandate of curbing maladministration when it has no oversight over some top potential perpetrators.

4.3.3 THE PUBLIC PROTECTOR ACT OUSTS SOME OF THE PUBLIC PROTECTOR'S AUTONOMY AND POWERS

There are two major instances where the Public Protector Act may be argued to oust some of the constitutional autonomy and power endowed on the Public Protector.

The first instance is regarding the decision making power of the Public Protector. Article 244(2)(c) endows the Public Protector with autonomy to make appropriate remedial decisions. It provides that the Public Protector may make a decision on an action to be taken against a public officer or constitutional office holder. Article 244(4) goes further to provide that the Public Protector shall not be subject to the direction or control of a person in the performance of the functions of office.

Part IV of the Public Protector Act addresses investigatory hearings. Section 20(1) provides that the Public Protector may hold hearings for the purpose of conducting an investigation. This provision is drafted in optional terms. The implication is that the Public Protector has the liberty to decide whether to hold hearings where appropriate or not. In the absence of a hearing, the Public Protector makes decisions on actions to be taken against public officers as per Article 244(2)(c) of the Constitution.

However, where the Public Protector decides to hold a hearing for the purpose of conducting an investigation as per section 20(1), the Act creates a situation where the Public Protector's autonomy is ousted. Section 21 of the Public Protector Act provides for the proceedings at hearings. Section 21(3) provides that the determination of a matter before the Public Protector shall be according to majority of the members. What this implies is that it is possible for the Public Protector to be outvoted by other members of the hearing who may be in the majority. Given this situation, the Public Protector may be prevented from making investigatory decisions necessary to fulfill its mandate by subordinate officers with no constitutional mandate to exercise the role of the Public Protector.[13] This is despite the autonomy that is given to the Public Protector by the Constitution to make decisions on an action and to not be subject to the direction or control of any person.

In comparison to a different investigatory institution, the Anti-Corruption Commission, the Anti-Corruption Act[14] does not create any such situation. This Act endows the Director-General with autonomy to make decisions in investigatory matters as per section 52 of the Act. Section 53 gives the Director-General powers to compel any person whose affairs or conducts are being investigated to appear before the Director-General. The Act reserves the power and autonomy of the Director-General to make any investigatory decision. This power and autonomy is not ousted in any way under the Act.

In contrast, as earlier alluded to, section 21(3) of the Public Protector Act creates a situation where the decision making autonomy of the Public Protector during an investigatory hearing may be ousted by other members of the hearing. This is a weakness of the Office of the Public

[13] Felicity Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance in Africa: Administrative Justice in Common-Law Africa* (Siber Ink CC 2019), 38-46
[14] Act No. 3 of 2012

Protector as the constitutional autonomy of the Public Protector conflicts with the procedural operations of the Office. Although Article 243(4) provides that the procedures and operations of the Office shall be prescribed by an Act, the Public Protector is still endowed with unfettered constitutional autonomy. The constitutional autonomy of the Public Protector is thus watered down by the existence of the conflicting provision of the Act. This reduces the efficacy of the Public Protector in fulfilling its mandate as its autonomy to do so may be ousted by its subordinates.

In addition, the Public Protector Act does not expressly state who the members of the hearings are. The Act creates ambiguity in the sense that although it provides for members of staff that compose the Office of the Public Protector such as the Registrar and Chief Administrator; it does not give them the power or duty to sit in investigatory hearings. It is therefore unclear what members the Act is referring to with regards to investigatory hearings.

The second instance is regarding the procedural autonomy of the Public Protector. Article 244(4) of the Constitution provides that the Public Protector shall not be subject to the direction or control of a person or an authority in the performance of the functions of office. Essentially, this gives the Public Protector procedural autonomy in the performance of its functions, meaning it is at liberty to decide the manner in which it will best perform its functions. Furthermore, section 22(1) of the Public Protector Act provides that when conducting a hearing, the Public Protector is not bound by the rules or practice of evidence. Section 22(2) also provides that the Public Protector shall conduct hearings with as little formality and technicality. This is to enhance efficiency in the handing of matters before the Public Protector.

However, section 42(1) of the Public Protector Act appears to water down the constitutional autonomy of the Public Protector and conflict with other provisions of the Act. Among other things, the section provides that the Chief Justice may, by Statutory Instrument, make rules relating to the manner and form of summoning persons by the Public Protector; relating to the proceedings of the Public Protector; the procedure to be followed and rules of evidence to be observed in proceedings before the Public Protector; and to make rules relating to the procedure to be followed and rules of evidence to be observed in proceedings before the Public Protector.

Clearly, this is an attempt at directing how the Public Protector is to conduct itself in the performance of its functions. This is despite the clear constitutional pronouncement that the Public Protector shall not be subject to the control or direction of any person or authority in carrying out its functions. The provision in question creates a situation where the functioning of the Public Protector is directed by another authority, the Chief Justice. This waters-down the power of the Public Protector as its autonomy to determine its manner of fulfilling its functions and mandate is diluted. In addition, the provision in question also conflicts with progressive provisions meant to make the institution more efficient with handling cases. As a result, dilution of powers in determining the performance of the ombudsman functions contributes to the inefficaciousness of the institution as was experienced by the Public Protector's predecessor.

4.3.4 THE PREJUDICIAL EFFECT OF THE REQUIREMENT TO GIVE NOTICE BEFORE INVESTIGATING A STATE INSTITUTION

The Constitution establishes investigatory duties as one of the core functions of the Public Protector. Article 244(1) of the Constitution of Zambia (Amendment) Act provides that the

Public Protector may investigate an action or decision taken or omitted by a state institution in the performance of an administrative function.

The Public Protector Act introduces a supplementary provision to the investigatory duties of the Public Protector. Section 28 of the Act provides for notices. Section 28(1) provides that the Public Protector shall, where it intends to conduct an investigation on a state institution, give the state institution notice in the prescribed manner and form. Section 28(2) goes further to qualify the notice by providing that the notice shall inform the state institution of the Public Protector's intention to conduct an investigation; shall identify the subject of a complaint; and shall state the powers that the Public Protector may exercise. Because this provision is drafted in mandatory terms, the ramification is that it is mandatory for the Public Protector to inform state institutions of their intention to investigate before any investigation can be conducted.

It may therefore be argued that this mandatory requirement has the potential of prejudicing an investigation before it is conducted.

To investigate is to make an official inquiry into a matter systematically. The process of investigation includes searching and inquiring into allegations and the collection of evidence. An investigation plays an important role in any allegations made as it may make or impair subsequent proceedings regarding the allegations. An investigator or investigative wing has the duty to ensure that all evidence required in proving an allegation is collected through investigation and is ready for presentation before a court or tribunal.[15]

An investigation is significantly reliant on the information given to an investigator or investigative wing by a complainant. Good administrative practice requires that confidentiality

[15] Oluwafemi Alexander Ladapo, 'Effective Investigations, A Pivot to Efficient Criminal Justice Administration: Challenges in Nigeria' (2011) *African Journal of Criminology and Justice Studies Vol. 5, Issue 1 & 2*

and care is exercised in handling information vital to an investigation at all times as the information serves to identify victims, recover evidence, discover witnesses and identify perpetrators.[16] Because an investigation is significantly reliant on the information supplied to the investigator by a complainant, protection of information is therefore vital before an investigation is conducted. Leakage of information before an inquiry into an allegation has the potential of jeopardizing the whole operation as it gives perpetrators the opportunity to suppress evidence, tamper with witnesses and cover their tracks. Therefore, premature exposure of an investigation or vital information before a thorough inquiry is conducted has prejudicial consequences.[17]

Given this fact, it may be argued that the mandatory requirement regarding the Public Protector's need to inform state institutions of its intention to investigate it have the same prejudicial effects. This is because with such notice, perpetrators are potentially alerted to the possibility of an inquiry into their actions or decisions. This may allow them to take steps to cover up their misdeeds, suppress evidence and tamper with witnesses. This is further exacerbated by the fact that the Public Protector is also required to state what powers it may exercise in the investigation. Clearly, this is a recipe for prejudicing the accuracy and credibility of an investigation.

In other investigative wings such as the Anti-Corruption Commission, there are no such legal requirements for conducting an investigation. Section 52 of the Anti-Corruption Act[18] provides that upon receipt and consideration of an allegation or complaint, the Director-General of the Commission may decide whether or not to begin the investigation. The only notice required to be given is to the complainant of whether or not the allegation will be investigated as per section

[16] Office of the United Nations High Commissioner for Human Rights, 'Human Rights and Law Enforcement: A Trainer's Guide on Human Rights for the Police' (2002) *United Nations Professional Training Studies No.5/Add.2*
[17] Oluwafemi Alexander Ladapo, 'Effective Investigations, A Pivot to Efficient Criminal Justice Administration: Challenges in Nigeria' (2011) *African Journal of Criminology and Justice Studies Vol. 5, Issue 1 & 2*
[18] Act No. 3 of 2012

52(6) of the Act. There is no legal requirement to give notice to the person or body an allegation is brought against and may be investigated. Presumably, this is to avoid the prejudicial effects of notice as earlier alluded to.

In conclusive, the insertion of section 28 of the Public Protector Act obligating the Public Protector to give notice before carrying out an investigation waters down the efficacy of the Public Protector in investigation of allegations of maladministration.

4.4 CONCLUSION

This chapter has endeavored to illustrate the positive provisions that were enacted in the Constitution Amendment Act of 2016 and the Public Protector Act meant to improve the efficacy of the ombudsman institution. It has shown how those provisions have improved the structure and operations of the institution. This chapter has also provided an account of the weaknesses and limitations that stifle the Public Protector. It has illustrated how those weaknesses and limitations affect the efficacy of the Public Protector. The next chapter will conclude the research paper and provide recommendations.

CHAPTER FIVE

GENERAL CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The essence of this research was to assess the efficacy of the Public Protector in curbing maladministration in Zambia. Having addressed the issues that this research sought to address, this chapter concludes the research. It provides an overview of the research and highlights its findings. It then proceeds to provide recommendations in line with the research findings.

5.2 CONCLUSIONS

Chapter one laid down the foundation of the research. It provided an introduction into the research on the efficacy of the Public Protector in curbing maladministration in Zambia. It addressed the main aim of the research and gave a brief background into the subject matter. Further, it outlined the statement of the problem, research objectives and questions, methodology employed, and the literature that has informed this research to provide a knowledge bank.

Chapter two began by considering the origins of the ombudsman. It looked at where it began and the reasons that led to its establishment. It then addressed the spread and development of the ombudsman in other parts of the world. Importantly, the chapter addressed the establishment of the ombudsman in Zambia. It established that the ombudsman was first introduced as the Investigator-General who headed the Commission for Investigations. In addition, this chapter addressed the qualifications of the Investigator-General and the composition of the Commission for Investigations. Lastly, it addressed the functions, jurisdiction and the powers of the Investigator-General and the Commission for Investigations.

Chapter three sought to address the establishment of the Public Protector and the reasons for its establishment. It began by outlining the weaknesses and limitations that stifled the Commission for Investigations and discussed how these limitations encumbered the institution. It was realized that there was need for reform. Flowing from this, chapter three then looked at the efforts that were made to reform the institution. It established that the reform came in 2016 through the enactment of the Constitution of Zambia (Amendment) Act and the Public Protector Act. These two instruments establish and operationalize the Public Protector to replace the Investigator-General as ombudsman and the Commission for Investigations as the ombudsman institution.

Chapter three moved on to address the role and mandate of the newly established Public Protector. The chapter then addressed the qualifications and tenure of the Public Protector. It also looked at the composition of the Office of the Public Protector. Lastly, it addressed the functions, powers and jurisdiction of the Office of the Public Protector.

Chapter four sought to assess the efficacy of the Public Protector in its operations and in fulfillment of its mandate. It began by discussing some of the weaknesses and limitations of the Commission for Investigations that were remedied by the establishment of the Public Protector. Chapter four went on to explore the limitations and weaknesses that encumber the Public Protector. This was with the purpose of assessing the efficacy of the Public Protector in its operations and in its ability to fulfill its mandate.

5.3 RESEARCH FINDINGS

The research found that although efforts to reform the ombudsman institution under the Commission for Investigations system began as early as 1995, the reform only came in 2016 through the Constitution of Zambia (Amendment) Act of 2016 and the Public Protector Act.

The research found that the Public Protector is a more enhanced office in comparison to the Investigator-General. By law, the Public Protector has wider powers, more functions and duties, a wider jurisdiction and more independence. The Office of the Public Protector is also a more advanced ombudsman institution compared to the Commission for Investigations. It has more qualified officers, better and more stable funding, a wider jurisdiction and more investigatory powers. This was all introduced in order to enable it to effectively fulfill its mandate.

The research found that the Public Protector is encumbered by weaknesses and limitations in its legal framework and other external weaknesses. It found that the biggest weakness has been a total lack of implementation of the institution's new structure. Despite changes to the legal framework establishing the structure and operations of the institution, the government has not empowered the institution or implemented the institution's new structure to be operationalized fully. The research found that the institution continues to operate as its predecessor did and therefore, its predecessor's limitations continue to be the Public Protector's limitations.

Furthermore, the research found that the legal framework of the institution continues to immunize top government officials by not including them within the jurisdiction of the Public Protector. Any maladministration perpetrated by or involving these officials cannot be investigated for lack of authority to do so.

In addition to this, the research also found that the Public Protector Act ousts some of the Public Protector's autonomy and powers through contradictory provisions within itself and between itself and the Constitution. Lastly, the research found that the procedural requirement that the Public Protector must give notice to state institutions before conducting any investigations has a prejudicial effect on any investigations that may be conducted. This is because giving such

notice gives perpetrators of maladministration the opportunity to tamper with evidence and witnesses.

5.4 RECOMMENDATIONS

An effective ombudsman institution is an indispensable institution in a democratic nation as it ensures good governance and public administration. Having established that the Public Protector is encumbered by weaknesses and limitations that reduce its efficacy, the following measures are recommended:

5.4.1 IMPLEMENTATION OF THE NEW PUBLIC PROTECTOR SYSTEM AND STRUCTURE BY GOVERNMENT

The first recommendation is the need to implement the new Public Protector system. Having established that there are many changes to the structure and the operations of the institution that were introduced by the Constitution of Zambia (Amendment) Act of 2016 and the Public Protector Act of 2016, there is need for the government to fully implement the new system. The government should financially empower the institution in order for the institution to actualize its new structure. This is important because it will enable the Public Protector to decentralize its offices to all the provinces, to employ the relevant officers pursuant to the Act and to put in place sensitization programs as required by the Act. This will enable the institution to carry out its operations more effectively. The intended result is the enhancement of the Public Protector's efficacy.

5.4.2 AMENDMENT OF THE CONSTITUTION

The second recommendation is the need to amend the Constitution. Although the Constitution provisions establishing the Public Protector were only enacted in 2016, there is need to amend these provisions. Having recognized that the Constitution provisions do not expressly encompass some top government officials, there is need to amend these provisions to that effect. Having looked at the jurisdiction of the Public Protector of South Africa in cases of maladministration, it is essential to adopt a similar approach in Zambia. This approach not only increases the efficacy of the Public Protector but also makes top government officials accountable to the public for their actions. It is therefore imperative for parliament to see to it that the constitutional jurisdiction of the Public Protector encompasses top government officials such as ministers.

5.4.3 AMENDMENT OF THE PUBLIC PROTECTOR ACT

Having recognized that the Public Protector Act in section 21(3) ousts some of the Public Protector's autonomy and powers as provided in Article 244(3) of the Constitution, there is need to amend the provision in question. There is need to amend this provision as it ousts the decision making power of the Public Protector in investigatory hearings. The Act needs to reserve the unfettered power of the Public Protector to make decisions as provided in the Constitution.

Further, the Act needs to be amended in order to fill the existing gap with regard to who the members of the investigatory hearings are. It needs to expressly provide for the identity of the members of the investigatory hearing and their qualifications. This is in order to ensure the suitability of these members to hear matters.

Parliament also needs to see to it that the contradiction between section 22(1) and section 42(1) of the Act is resolved. On one hand, section 22(1) of the Act provides that the Public Protector shall not be bound by the rules or practice of evidence. On the other hand, section 42(1) provides that the Chief Justice shall make rules of evidence and rules relating to practice for the Public Protector to follow. As already illustrated, this creates a conflict. Parliament must therefore remedy this conflict by amending the contradictory provisions.

Another important amendment is the need to remove the mandatory requirement of giving notice to a state institution before conducting an investigation as provided in section 28. As illustrated, this has a prejudicial effect on the investigatory operations of the Public Protector thereby reducing the efficacy of its investigations. Parliament should see to it that this provision is repealed in order to enhance the efficacy of the Public Protector's investigations.

5.4.4 MORE AWARENESS PROGRAMMES AND PUBLIC EDUCATION

It is widely recognized that many members of the public are still not aware of the existence of the Public Protector or the role that the Public Protector plays. This has been exacerbated by the lack of implementation of the new Public Protector system that requires that the office puts measures in place to educate the public and raise awareness on its role and mandate pursuant to section 6(2)(f) of the Act. Although the Act assigns the Public Protector with the duty of educating the public and raising awareness, the government should do more to educate and sensitize the public. The government should not leave this duty entirely to the Public Protector as it is still a relatively new institution. The government must do more to educate and sensitize the public on the importance of the Public Protector. This can be done through already existing government structures under the Ministry of Home Affairs and

Internal Security, Ministry of Justice and the Ministry of Community Development and Social Services.

5.4 CONCLUSION

This chapter has given an overview of the research by drawing conclusions and findings of each chapter. It has also provided recommendations on how the efficacy of the Public Protector in curbing maladministration can be enhanced. Essentially, this research found that although the Public Protector system has been established with an enhanced role and structure, it is still encumbered by some limitations and weaknesses. This can be cured through the recommendations that have been brought forth by this research.

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